



INTERIOR BOARD OF INDIAN APPEALS

Honaghaahnii Marketing & Public Relations v. Navajo Area Director,
Bureau of Indian Affairs

18 IBIA 144 (02/14/1990)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

HONAGHAAHNII MARKETING AND PUBLIC RELATIONS, INC.

v.

NAVAJO AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 89-74-A

Decided February 14, 1990

Appeal from a decision of the Navajo Area Director, Bureau of Indian Affairs, denying an application for a grant under the Indian Business Development Program.

Affirmed.

1. Board of Indian Appeals: Jurisdiction--Indians: Financial Matters: Financial Assistance

Decisions concerning whether to approve an application for a grant under the Indian Business Development Program are committed to the discretion of the Bureau of Indian Affairs. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

2. Indians: Financial Matters: Financial Assistance

25 CFR 286.3 requires that, in order to be eligible for a grant under the Indian Business Development Program, an economic enterprise must be controlled by the management decisions of its Indian owners.

APPEARANCES: John H. McLean, appellant's President, for appellant; Thomas O'Hare, Esq., Office of the Solicitor, U.S. Department of the Interior, Window Rock, Arizona, for appellee.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Honaghaahnii Marketing and Public Relations, Inc., through its President, John H. McLean, challenges a May 15, 1989, decision of the Navajo Area Director, Bureau of Indian Affairs (Area Director; BIA), denying its application for a grant under the Indian Business Development Program (IBDP). For the reasons discussed below, the Board affirms the Area Director's decision.

Background

The IBDP is authorized by Title IV of the Indian Financing Act of 1974, as amended, 25 U.S.C. §§ 1521-1524 (1982 and Supps.). 1/ Regulations governing the program are found at 25 CFR Part 286.

On November 21, 1988, appellant applied to the Navajo Area Office for an IBDP grant in the amount of \$100,000. Appellant sought the grant to provide funding for its basic operating expenses and to allow it to participate in international trade fairs, at which it proposed to market Navajo and other Southwestern Indian arts and crafts. Appellant's application included, inter alia, a November 14, 1988, agreement between appellant and Jah Tally, Inc., d.b.a. JB Tanner Trading Company (Jah Tally), by which Jah Tally agreed to extend appellant a \$300,000 line of credit for the purchase for resale of Southwestern Indian arts and crafts from Jah Tally. The agreement was made contingent upon appellant's receipt of the IBDP grant from BIA.

Appellant's application was reviewed by the Area Credit Officer who recommended disapproval on the grounds that there would be no economic benefit to the Navajo Reservation. The application was also reviewed by an Area Office review committee, which recommended approval in the amount of \$60,000. Both reviews took place on December 6, 1988.

By memorandum of December 23, 1988, the Area Director transmitted the application to the Deputy to the Assistant Secretary - Indian Affairs (Trust and Economic Development), recommending that it be disapproved. Apparently, he made this referral in the belief that he could not act on the application because it exceeded the maximum grant amount of \$50,000 set in the regulations governing the IBDP program. 2/ The Deputy returned the application to the Area Director by memorandum of January 12, 1989, stating that it should be acted upon by the Area Director. He noted that, while the Area Director could not approve a grant in excess of \$50,000 absent a waiver of the regulations, he could disapprove an application for such an amount without violating the regulations.

1/ 25 U.S.C. § 1521 (1982) provides:

"There is established in the Department of the Interior the Indian Business Development Program whose purpose is to stimulate and increase Indian entrepreneurship and employment by providing equity capital through nonreimbursable grants made by the Secretary of the Interior to Indians and Indian tribes to establish and expand profit-making Indian-owned economic enterprises on or near reservations."

2/ See 25 CFR 286.17(c). This was a limitation contained in the original version of 25 U.S.C. § 1522(a). In 1984, the statutory limit was raised to \$100,000 in the case of an Indian and \$250,000 in the case of an Indian tribe. Act of Oct. 4, 1984, 98 Stat. 1725, § 9. The regulation has not yet been amended to reflect this change, although proposed amendments were published at 54 FR 26800 (June 26, 1989).

On January 24, 1989, the review committee again considered the application, after meeting with appellant's representatives. It recommended approval of appellant's application in the amount of \$100,000.³

By memorandum of January 27, 1989, the Credit Officer recommended against approval on the grounds that: (1) the marketing program would benefit primarily Jah Tally, rather than Indian craftspeople, because sales would be made from Jah Tally's inventory; (2) the \$300,000 line of credit actually represented Jah Tally's inventory, an arrangement also of primary benefit to Jah Tally; and (3) appellant's negative equity position, after having been in business for two years, indicated its weakness in meeting credit obligations.

The Superintendents of two Navajo agencies also submitted their views concerning the application. By memorandum of December 6, 1988, the Superintendent, Fort Defiance Agency, BIA, recommended disapproval of the application; by memorandum of January 27, 1989, the Superintendent, Eastern Navajo Agency, BIA, noted concerns with the application and stated: "These concerns make it difficult to support the application in its present form."

On February 1, 1989, the Assistant Area Director informed appellant that its application could not be approved. Appellant appealed to the Area Director, who affirmed the decision on May 15, 1989. The Area Director's decision states in part:

[T]he foreign market initiative will have no significant economic and employment impact to the Navajo reservation (nearest to business location). The intent of the Indian Financing Act is to award grant funds to an Indian business which will make an economic contribution to the reservation by increasing employment of Tribal members living on the reservation and by expending a portion of its income for materials and services on the reservation.

You claim that future indirect employment, craftsmen added to cottage industry, increased use of Navajo wool, and increasing price for Indian crafts will result from the marketing effort. Nonetheless, your marketing plan indicates that your major purchases of Indian arts and crafts will be from Jah Tally, Inc., a major off-reservation non-Indian wholesaler, and from other similar businesses.

³/ The committee minutes indicate that the recommendation included a condition that only \$40,000 would be advanced initially to cover two trade shows, and that appellant would receive the remainder only if it met its sales projections for those shows. Further, the committee recommended that the grant agreement contain a requirement that the Navajo Arts and Crafts Enterprise (a tribally owned arts and crafts marketing enterprise), Indian-owned businesses, and individual Indian craftsmen be given first preference in filling orders brought back from the shows.

This arrangement is not within the intent of the Act, because I see no direct benefits or services to any Indian businesses or craftsmen on the reservation, especially when direct purchases are not going to be made from reservation sources. Also the plan does not fully support the increase of Indian jobs upon inception of the marketing expansion. We feel that benefits advanced by your brief are speculative and indirectly contribute to the economy of the Navajo reservation.

Further, I find the grantee has no independence in his business dealings. [Appellant] is an agent of Jah Tally, Inc., because the line of credit agreement indicates that [appellant] will not make any business decision without the approval of Jah Tally, Inc. and further agreements will be required. This type of credit arrangement is contrary to Title 25 Code of Federal Regulations (C.F.R.), Part 286.3.

I disagree with your position that since your business lacks capital it should be granted an award. I believe that the negative equity position of the business has a direct bearing on the feasibility of the project. Even with our grant assistance, equity built-up to leverage loans for future working capital and inventory needs is inadequate. The business having marginal borrowing ability to enter a new market would not be feasible.

Appellant appealed this decision to the Board. The appeal was docketed on July 17, 1989. Both appellant and appellee filed briefs.

Discussion and Conclusions

Appellant objects both to the procedures followed by the Area Office in evaluating its application and to the conclusions reached by the Area Director in his May 15, 1989, decision.

Appellant contends that the Area Office should have published and disseminated procedures by which its application was to be evaluated. Further, it contends, the Area Director was not authorized to overturn the determination of the review committee unless he found good cause for doing so, pursuant to formally articulated standards, and unless appellant was allowed to participate in proceedings before the Area Director. Since such procedures were not followed, appellant argues, its due process rights were violated.

Appellant also contends: (1) the Area Director incorrectly relied on appellant's lack of capital as a reason for denying its application; (2) contrary to the Area Director's conclusion, its proposed program will create indirect employment for Navajo and other Southwestern Indian craftspeople; (3) the Area Director incorrectly concluded that appellant was an agent or "front" for Jah Tally.

The Area Director contends that the agreement between appellant and Jah Tally vests control over appellant's operation in Jah Tally and that

appellant is therefore merely the agent of Jah Tally. He denies that appellant's due process rights were violated at the Area Office level, but argues that, if they were, appellant's hearing before this Board affords it the due process to which it is entitled. 4/

[1] Before addressing appellant's arguments, the Board must consider the extent of its jurisdiction to review the Area Director's decision. To the extent the decision was based on the exercise of discretionary authority, the Board lacks jurisdiction over it. 43 CFR 4.330(b)(2). The Board may, however, review such a decision to the extent it reaches a legal conclusion. E.g., Simmons v. Deputy Assistant Secretary - Indian Affairs (Operations), 14 IBIA 243, 247 (1986). In reviewing a discretionary decision, it is not the Board's function to substitute its judgment for that of BIA. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion. See, e.g., Lower Elwha Tribe v. Portland Area Director, 18 IBIA 50 (1989); Romo v. Acting Phoenix Area Director, 18 IBIA 16 (1989); City of Eagle Butte v. Aberdeen Area Director, 17 IBIA 192, 96 I.D. 328 (1989).

Decisions concerning whether or not a particular application for an IBDP grant should be approved are committed to the discretion of BIA. Even so, the Board may consider appellant's allegations in this appeal that the Area Director followed improper procedures during his consideration of appellant's application, thereby violating appellant's due process rights.

Appellant relies on Part 80 of the BIA Manual for its argument that proper procedures were not followed. It is apparent, however, that the Manual does not contemplate the kind of procedure appellant envisions. 80 BIAM 3.4 and 3.5 set out review and approval procedures for IBDP grant applications. 6/ These sections make it clear that the function of review

4/ Appellant cites the Board's decision in Atchison, Topeka and Santa Fe Railroad Co. v. Deputy Albuquerque Area Director, 14 IBIA 46, 56, 93 I.D. 79, 85 (1986). In that decision, the Board stated:

"[A]ny due process violation which appellee may have committed has been rendered harmless by the present proceeding. In Racquet Drive Estates, Inc. v. Deputy Assistant Secretary - Indian Affairs (Operations), 11 IBIA 184, 195, 90 I.D. 243, 249 (1983), this Board held that the requirements of due process could be met through its administrative review proceedings."

5/ 43 CFR 4.330(b)(2) provides:

"Except, as otherwise permitted by the Secretary or the Assistant Secretary - Indian Affairs by special delegation or request, the Board shall not adjudicate:

* * * * *

(b) Matters decided by the Bureau of Indian Affairs through exercise of its discretionary authority."

6/ These sections provide in relevant part:

"3.4 Application Review and Analysis. Approving officials shall establish their own procedures for application review, analysis and processing. Past experience has shown that committees formed of two or three

committees is to make recommendations and that Area Directors make the decisions concerning grant applications. Although Area Directors are authorized by 80 BIAM 3.5 to redelegate decisionmaking authority to Superintendents, they are not authorized to redelegate such authority to review committees. Further, the forms completed by the review committee in this case clearly indicate that a recommendation, not a decision, was intended. Accordingly, contrary to appellant's assertion, no "determination" was made by the review committee, and the Area Director did not "overturn" any decision made by the review committee. Rather, the Area Director sought advice from his staff prior to making his decision, as he was clearly entitled to do. In this case, he sought recommendations from a review committee, the Area Credit Officer, and two Superintendents.

Although the record does not show that appellant was formally advised of the review procedures to be followed with respect to its grant application, appellant's own filings indicate that it was generally aware of the procedures. Appellant was given an opportunity to make an oral presentation before the review committee and was in frequent contact with BIA personnel concerning its application while it was under review. It is clear from the record that appellant was given ample opportunity to present its case.

Contrary to appellant's contentions, there is no provision in the relevant statute, regulations, or BIA Manual sections that entitled appellant to appear personally before the Area Director or required the Area Director to conduct proceedings in public, or "on the record." Appellant has not shown that it was entitled to any participation in the review process beyond what it was afforded.

The Board finds that appellant was not deprived of any due process rights by the manner in which its application was considered.

Appellant also disputes the reasons given by the Area Director for denying its application. Of those reasons, two are arguably based on legal conclusions, making them subject to review by the Board.

[2] The Area Director's conclusion that appellant's credit arrangement with Jah Tally is contrary to 25 CFR 286.3 is, in essence, a conclusion that appellant is an ineligible applicant for an IBDP grant. 25 CFR 286.3 provides in part:

fn. 6 (continued)

staff members work well in this regard. Such committee, or other adopted reviews, should evaluate the proposal, document that the application meets the requirements of 25 CFR [Part] 80 [now 25 CFR Part 286], that the applicant and project meet all eligibility requirements, and make their recommendations on Form 5-8003. * * *

3.5 Action on Applications. Area Directors will either grant tentative approval, approve, or disapprove applications for grants, or may redelegate such authority to Superintendents to the extent he [sic] deems appropriate after evaluation of each agency's capabilities."

Eligible applicants.

Applications for grants may be accepted only from individual Indians, Indian tribes, Indian partnerships, corporations or cooperative associations authorized to do business under State, Federal, or Tribal law. * * * Associations, corporations or partnerships shall be at least fifty-one percent owned by eligible Indians or an eligible Indian tribe. This Indian ownership must actively participate in the management and operation of the economic enterprise by representation on the board of directors of a corporation or cooperative association proportionate to the Indian ownership which will enable the Indian owner(s) to control management decisions.

Appellant states that it is incorporated under the laws of New Mexico and is wholly owned by its President, a member of the Navajo Tribe. The Area Director argues that appellant is in fact controlled by Jah Tally, under the terms of their November 14, 1988, "Agreement to Extend Line of Credit." That agreement provides in part:

(1) Jah Tally hereby * * * agrees to extend to [appellant] a line of credit for the purchase for resale of Southwestern Indian arts and crafts from [Jah Tally]. [Jah Tally] agrees to extend a line of credit of up to \$300,000.00 for this purpose. The indebtedness created by the utilization of this line of credit by [appellant] shall be secured by a lien upon the goods purchased from [Jah Tally] with the line of credit until they are sold, and thereafter by a lien upon the proceeds of the sale of such goods.

* * * * *

(4) It is further understood that [appellant] will discuss with [Jah Tally] [appellant's] plans for participation in any international trade fair, trade mission, or show and sale for which [appellant] seeks to obtain goods for resale through the utilization of the line of credit provided for in this agreement. In each instance in which the line of credit called for in this agreement is utilized to purchase goods for display and resale in connection with any such event, [appellant] and [Jah Tally] shall memorialize and agree upon in writing the numbers, kinds, quality and cost to [appellant] of all goods so purchased, the arrangements made by [appellant] for the transport of the goods and participation in the event, and similar matters relevant to [appellant's] plans for the display and sale of goods.

(5) The parties shall also memorialize and agree upon in writing the terms for repayment by [appellant] of any amounts extended pursuant to the line of credit in connection with each particular instance in which the line of credit is utilized. * * * These more specific agreements may provide for authorized returns and exchanges as necessary to maintain reasonable business practices for the show and wholesale marketing of the craft

items involved in each particular purchase under the line of credit and each particular event for which the goods are purchased, and for any other condition not inconsistent with this agreement which to the parties shall appear appropriate to the particular transaction.

(6) It is understood that [appellant] may, in furtherance of its efforts to develop a major marketing effort for Native American arts and crafts, enter into similar agreements with other providers of Southwestern Indian arts and crafts. It is agreed however, that [appellant] shall not while owing any sum to [Jah Tally] pursuant to this agreement, obtain or maintain at any one time outstanding indebtedness of more than \$500,000.00 under this or any other lines of credit from any other such providers of craft items for the acquisition of arts and crafts items for resale in the world market without the written consent of [Jah Tally]. It is also understood that in regard to any individual marketing event, in filling orders in excess of the amount purchased for that event for resale by [appellant], [appellant] shall endeavor as a first effort to fill such orders from [Jah Tally] and any other creditors who have extended similar lines of credit for acquisition of by [appellant] in connection with said event, in proportion to the extent to which they have extended lines of credit to [appellant] for purchase of arts and crafts of the kind involved in the display and sale. [Emphasis in original.]

A review of this agreement reveals that Jah Tally is vested with significant control over appellant's operation. Given the relationship between the two companies created by the agreement, it is difficult to see how appellant's management decisions can be controlled by appellant's Indian owner, as 25 CFR 286.3 requires. The Board finds that the Area Director reasonably concluded that appellant's relationship with Jah Tally made it ineligible for an IBDP grant.

The second arguably legal conclusion reached by the Area Director is that appellant's arrangement for purchase of arts and crafts items from Jah Tally was not within the intent of the Indian Financing Act because there would be no direct benefits to Indian businesses or craftspeople on the reservation. 7/ Appellant argues that reservation craftspeople will benefit indirectly because of increased demand for their products.

While the statute contemplates that IBDP grants will be used to "stimulate and increase * * * Indian employment," there is nothing in

7/ In his Jan. 27, 1989, memorandum to the Area Director, the Credit Officer stated:

"[T]he demand for rugs and crafts to be created by the foreign market effort will take anywhere from three to five years to develop. I believe the intent of the Indian Financing Act is to provide for immediate employment within the business being funded."

the statute or regulations that indicates how direct or how immediate the increased Indian employment is required to be. However, it was clearly within the Area Director's authority to consider whether appellant's proposal would in fact increase Indian employment. The Board finds that it was reasonable for him to consider as well, among other factors, the nature of employment that might be created and the length of time it might take for such employment to develop.

After a thorough review of the administrative record, the Board concludes that the Area Director committed no legal error and therefore finds no reason to disturb his decision to deny appellant's application.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Navajo Area Director's May 15, 1989, decision is affirmed.

//original signed

Anita Vogt
Administrative Judge

I concur:

//original signed

Kathryn A. Lynn
Chief Administrative Judge